In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1414

DONNELLY ADVERTISING CORPORATION OF FLORIDA and EMPIRE INDUSTRIES CORPORATION,

Petitioners,

vs.

CITY OF MIAMI, ET AL., ETC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Counsel for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

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The Petitioners, Donnelly Advertising Corporation of Florida, a Florida corporation and Empire Industries Corporation, a Florida corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on January 7, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is unreported, and appears in Appendix A, *infra*, pp. App. 1. The Opinion of the United States District Court for the Southern District of Florida has not been reported. A copy of that decision appears in Appendix B, *infra*, pp. App. 2-6.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Fifth Circuit was entered January 7, 1976. See Appendix A, p. App. 1, *infra*. This Petition for a writ of certiorari was filed within 90 days of said date. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

The Petitioners are engaged in the selling and leasing of advertising space on outdoor advertising signs within the City of Miami, Florida. The City of Miami amended its Comprehensive Zoning Ordinance to prohibit outdoor advertising signs in areas zoned C-2 and W-1. As a result of this amendment, a large portion of the Petitioners' signs within the City of Miami were declared illegal non-conforming uses.

A five-year amortization period was provided by the ordinance, however, when the amortization period expired, the Petitioners were tried and found guilty in Municipal Court of violating the ordinance. The Municipal Court's verdict was affirmed on appeal.

In 1974, the Petitioners filed an action for declaratory and injunctive relief challenging the constitutionality of the City of Miami Outdoor Advertising Ordinance. The District Court dismissed the Complaint on the basis that the prior State Court convictions were res judicata and barred the action in Federal Court.

After denying oral argument, the Court of Appeal affirmed the lower Court without opinion.

The questions presented are:

1. Whether the local rules of the Fifth Circuit Court of Appeals which allow the Court to decide a case without oral argument and affirm a lower Court's decision without opinion violate the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a trial Court, when ruling on a motion to dismiss pursuant to Rule 12(b), *Federal Rules of Civil Procedure*, may accept uncertified and incomplete copies of a State Court proceeding attached to the motion, and base its ruling upon that evidence, without notifying the opposing party that the motion shall be treated as a summary judgment and disposed of as provided in Rule 56, *F.R.C.P.*

3. Whether a party is estopped from later litigating constitutional issues in Federal Court when the record of the prior State Court's proceeding does not specifically set forth those issues which had been raised and determined by the State Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 12(b): Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the

trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FIFTH CIRCUIT COURT OF APPEALS LOCAL RULES INVOLVED

RULE 18, SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 209.

RULE 21, AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

STATEMENT OF THE CASE

The Petitioners filed, in the United States District Court for the Southern District of Florida, a Complaint for Injunction and Declaratory Relief. The gravaman of the Petitioner's Complaint was the assertion that the City of Miami Ordinance Prohibiting Outdoor Advertising in certain locations was unconstitutional.

The Respondents moved to dismiss the Complaint on several grounds; however, res judicata was not among the grounds raised at that time. The Respondents later filed a second Memorandum of Law raising the issue of abstention. Again, res judicata was not raised as a defense.

Finally, the Respondents filed a third Memorandum of Law raising the issues of res judicata. With their Memorandum of Law, the Respondents attached certain uncertified and incomplete copies of proceedings and briefs filed in State and Municipal Courts. The Petitioners objected to this evidence as presented and alleged that it should not be considered at that time.

The trial Court granted the Respondent's Motion to Dismiss and relied completely upon the documents which had been filed with the Respondent's third Memorandum of Law. The trial Court ruled that the Petitioners were estopped from litigating in Federal Court since they had previously litigated in State Court. The Petitioners contended that the State Courts did not meet or decide the Constitutional questions raised and therefore they were not prohibited from bringing this action in Federal Court. The Petitioners requested a re-hearing on the matter and oral argument. Both requests were denied.

On appeal to the Fifth Circuit Court of Appeals, the Court placed the case on summary calendar and denied oral argument. Immediately after the case was placed on summary calendar, the Fifth Circuit affirmed the trial Court without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Fifth Circuit Court of Appeals has adopted local rules allowing the Court, in its discretion, to deny litigants

the right to an oral argument on appeal or an opinion when the lower Court's decision is affirmed. These rules have the effect of denying a litigant the right to a meaningful appeal. Such a denial is in violation of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution. A litigant in Federal District Court has been granted an appeal from all final judgments as a matter of right. 28 *USC* §1291.

Nevertheless, an appellate procedure which denies the litigant the open and equal access to the Courts violates the provisions of the United States Constitution. *Rinaldi v. Yeager*, 384 US 305; *North Carolina v. Pearce*, 395 US 711; *Mayer v. Chicago*, 404 US 189. Once the government has conferred the right to appeal, such appeal should be meaningful.

The right of a litigant to present his case in oral argument is left to the complete discretion of the Court. This allows the Appellate Court to arbitrarily classify certain appeals for summary treatment, thereby denying them the opportunity and procedures granted to other litigants. Such a denial of equal protection of the law must not stand.

The Petitioners would also contend that all litigants are entitled to a "reasoned" opinion by the Courts, and some may not be denied such an opinion at the whim of the Court.

2. The Court below has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

The Court of Appeals, by affirming the trial Court's decision, has ruled that when inadmissible and incomplete evidence is submitted on a motion to dismiss, supporting a defense which does not appear on the face of the complaint, a Court may accept the evidence and dismiss the complaint without notifying the opposing party and allowing an opportunity to respond to the evidence. This ruling is in conflict with the decisions of other Courts of Appeals. *Adams v. Campbell County School District*, 483 F.2d 1351 (10th Cir. 1973); *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971); *Huszar v. Cincinnati Chemical Works, Inc.*, 172 F.2d 6 (6th Cir. 1949).

The Court of Appeals, by affirming the trial Court's decision, has ruled that a litigant is collaterally estopped from litigating in Federal Court those issues which were not raised in a prior State criminal case, but which could have been litigated. This ruling is in conflict with other decisions of other Courts of Appeals. *Neaderland v. Commissioner of Internal Revenue*, 424 F.2d 639 (2d Cir. 1970); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970).

CONCLUSION

The decision below is erroneous. It denies the Petitioner the equal protection and due process of the laws of the United States. Furthermore, the decision is in direct conflict with the intent of the Federal Rules of Civil Procedure and the other Circuit Courts of Appeals. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

KORNER, SAMPSON
& PARTRIDGE
4790 Tamiami Trail (446-3587)
Coral Gables, Florida 33134

By _____
ROBERT D. KORNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE OF MAIL

I HEREBY CERTIFY that three copies of the foregoing Petition were served upon John S. Lloyd, City Attorney, City of Miami, Florida, 65 S.W. First Street, Miami, Florida 33130, by first class mail, postage prepaid on this 5th day of April, 1976.

_____
ROBERT D. KORNER
Of Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-2246
Summary Calendar*

DONNELLY ADVERTISING CORPORATION
OF FLORIDA and
EMPIRE INDUSTRIES CORPORATION,
Plaintiffs-Appellants,

versus

CITY OF MIAMI, ET AL, ETC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

(January 7, 1976)

BEFORE BROWN, Chief Judge, GODBOLD and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 74-1177-Civ-PF

DONNELLY ADVERTISING CORPORATION
OF FLORIDA, and
EMPIRE INDUSTRIES CORP.,
a Florida corporation,

Plaintiffs,

vs.

CITY OF MIAMI, a Municipal corporation;
MAURICE FERRE, Mayor;
REV. THEODORE GIBSON, City Commissioner;
ROSE GORDON, City Commissioner;
J. L. PLUMMER, City Commissioner and
MANOLO REBOSO, City Commissioner,

Defendants.

ORDER OF DISMISSAL

(Filed February 17, 1975)

The above styled matter is before the Court upon defendant's Motion to Dismiss plaintiff's Amended Complaint. Count I of the Amended Complaint alleges that Ordinance No. 6871, enacted by the defendants to prohibit the maintenance of outdoor advertising signs in its C-2 and W-1 zoning areas, and which by its language precludes anyone from seeking a variance to it, should be enjoined. Plaintiffs contend that their only resort for relief from the

ordinance is to seek an amendment thereof and that this is a violation of due process under the Fourteenth Amendment to the United States Constitution. Plaintiffs seek on that ground to have the defendants permanently enjoined from enforcing the ordinance against them.

Count II of the Amended Complaint alleges that a provision of said ordinance, which provides that five years after its enactment, all advertising then existing that violated the ordinance must be removed, and that failure to remove constitutes a crime, is an unconstitutional taking of property without just compensation, a violation of the Fourteenth Amendment. Injunctive relief is again prayed for.

Count III alleges that the defendants have taken action against them to require them to remove their signs in the C-2 and W-1 zoned areas while failing to take action against others who have non-conforming signs. Further, they allege that the defendants have not initiated action against other non-conforming uses located in non-conforming buildings except as against the advertising industry, even though the ordinance purportedly provides for their removal. Plaintiffs therefore contend that the defendants have unreasonably and arbitrarily discriminated against them in violation of their rights under the equal protection clause of the Fourteenth Amendment.

Count IV of the Amended Complaint is brought pursuant to Title 28, United States Code, Section 2201. It reiterates the plaintiffs' allegations contained in Counts I-III and further alleges that Ordinance No. 6871 contravenes Florida Statutes, §479.24 in that the City of Miami Ordinance does not provide for the removal of outdoor

advertising signs through the power of imminent domain as mandated by Florida Statute Section 479.24. Plaintiffs therefore seek to have the City of Miami Ordinance declared null and void as violative of the Fourteenth Amendment to the United States Constitution and the laws and Constitution of the State of Florida.

Count V of the Amended Complaint asks the Court to permanently enjoin the provisions of Article XXVIII, Section 3(3) of the City of Miami Comprehensive Zoning Ordinance No. 6871, which provisions provide for the amortization of non-conforming uses. Plaintiffs contend that the City of Miami was acting outside the scope of its powers when it enacted said ordinance and thereby denied plaintiffs due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the State of Florida, Declaration of Rights.

On July 5, 1973, the Dade County Circuit Court entered an order affirming a verdict of guilty in the Municipal Court for the City of Miami against the plaintiffs for violating the zoning Ordinance (No. 6871, as amended by No. 7338) which is the subject of this lawsuit. Included within plaintiffs' Assignments of Error to that Court were the following contentions.

1. The Court erred in determining that the ordinance under review was a valid exercise of the City of Miami's Police Power;

2. The Court erred in determining that the ordinance under review was not arbitrary, discriminatory and confiscatory as applied to Donnelly; and

3. The Court erred in determining that the ordinance under review was not a taking without compensation in violation of the Florida and United States Constitutions.

Plaintiffs thereupon appealed the Circuit Court's finding by way of a Writ of Certiorari taken to the District Court of Appeal, Third District. However, Plaintiffs' Petition was denied. Donnelly Advertising Corporation of Florida and Empire Industries Corporation v. City of Miami, Fla.App. 1974, 297 So.2d 653.

In E. B. Elliot Adv. Co. v. Metropolitan Dade County, 5th Cir., 425 F.2d 1141, 1148, the Court held:

> "Under the doctrine of res judicata, a prior judgment on the merits rendered by a state court of competent jurisdiction operates as a bar to a subsequent adjudication of the same cause of action, in substance rather than form, between the same parties or their privies in federal court, not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action, regardless of whether questions of federal or state law are involved. . . ."

This Court concludes that the issues raised in plaintiffs' complaint have been decided or could properly have been litigated in its appeal from the judgment rendered

against it in the City of Miami Municipal Court. Consequently, plaintiffs are barred from bringing this action on the ground of res judicata.

Therefore, it is ——

ORDERED AND ADJUDGED that plaintiffs' complaint is hereby dismissed.

DONE AND ORDERED at Miami, Florida this 17th day of February, 1975.

PETER FAY
UNITED STATES
DISTRICT JUDGE

cc:
Messrs. Korner & Sampson
John S. Lloyd, City Attorney

MIAMI REVIEW — MIAMI, FLORIDA

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 -- 377-3721

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARGUMENT

PETITIONERS' REASONS FOR GRANTING THE WRIT

1. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Petitioners complain that they have been denied oral argument or a written opinion under and by application of rules adopted by the United States Court of Appeals, Fifth Circuit (hereinafter the "Fifth Circuit").

Petitioners do not cite any case dealing with appellate court denial of oral argument or a written opinion.

The *Rinaldi v. Yeager*, 384 U.S. 305, case involved a requirement that a prisoner pay for a transcript of proceedings (in the case in which he was convicted) from his prison earnings. This was held discriminatory and invalid since persons convicted and receiving a suspended sentence or probation did not have to pay for their transcripts.

The *North Carolina v. Pearce*, 395 U.S. 711, case involved the imposition of greater sentences after a second trial when the initial conviction was reversed on appeal.

The case of *Mayer v. Chicago*, 404 U.S. 189, involved the Illinois rule of providing indigents free transcripts on appeal in *felony* cases *only*. Mayer, an indigent, was convicted of a non-felony and was denied an appellate transcript. It was held that transcripts must be provided to non-felony indigents as well as felony indigents.

Petitioners have not demonstrated that the denial of oral argument or a written opinion is so far a departure (if it is any departure at all) from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Court below has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

Under this point, petitioners complain that the U.S. District Court relied upon the opinion and record in State of Florida cases involving the same parties and subject matter as involved in the instant case and that the Fifth Circuit erroneously approved this procedure.

Petitioners claim that, in doing so, the Fifth Circuit is in conflict with three decisions of other courts of appeals on the same matter.

In two of the three decisions cited, *Adams v. Campbell County School District*, 10th Cir. 1973, 483 F.2d 1351, and *Dale v. Hahn*, 2d Cir. 1971, 440 F.2d 663, factual *affidavits* were on file and utilized by the court in granting defendants' motions to dismiss.

In the third case, *Huszar v. Cincinnati Chemical Works, Inc.*, 6th Cir. 1949, 172 F.2d. 6, Huszar's claim that an affirmative defense (prior public use—in a patent case) must be pleaded and proved was obviated by Huszar's pleading of prior public use in his counterclaim.

The case of *Paul v. Dade County, Florida*, 5th Cir. 1969, 419 F.2d 10, demonstrates the *lack* of conflict, peti-

tioners assert. In *Paul*, it was held that where the same question was previously litigated in the courts of the State of Florida which denied relief, the U.S. District Court lacked jurisdiction to re-litigate the same constitutional claims. The court said at p. 12:

> "Paul v. Dade County, Fla.Ct.App. 1967, 202 So.2d 833, cert. denied, Fla., 207 So.2d 690, cert. denied, 390 U.S. 1041, 88 S.Ct. 1636, 20 L.Ed.2d 304 is the prior state case and, while it was not made part of the record on this appeal, we may, of course, take judicial notice of it, *see* New York Indians v. United States, 1898, 170 U.S. 1, 32, 18 S.Ct. 531, 42 L.Ed. 927; Lambert v. Conrad, 9 Cir. 1962, 308 F.2d 571; Saint Paul Fire & Marine Insurance Company v. Cunningham, 9 Cir. 1958, 257 F.2d 731; Ayers v. Hartford Accident & Indemnity Company, 5 Cir. 1939, 106 F.2d 958; and of the pleadings therein, Zahn v. Trans-america Corporation, 3 Cir. 1947, 162 F.2d 36, 48 (n. 20), 172 A.L.R. 495."

Petitioners argue that cases involving *factual affidavits* and a case involving an affirmative defense which was neutralized by allegations contained in a counterclaim are in conflict with the instant Fifth Circuit judgment.

Again, petitioners have not demonstrated that the decision of the Fifth Circuit is in conflict with the decision of another court of appeal *on the same matter*.

Lastly, petitioners assert that the Fifth Circuit "has ruled that a litigant is collaterally estopped from litigat-

ing in a Federal Court those issues which were not raised in a prior State criminal case, but which could have been litigated."

Here, petitioners' basic premise is erroneous. Petitioners state that a case in the Miami Municipal Court is a criminal case. A violation of a municipal ordinance, such as is involved here, is not a *crime*. *Boyd v. County of Dade*, Fla. 1960, 123 So.2d 323. Petitioners reference to *criminal case* holdings in order to show a conflict with decisions of other courts of appeal is, therefore, simply misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Robert D. Korner, Esq., Korner, Sampson & Partridge, attorneys for petitioner, 4790 Tamiami Trail, Coral Gables, Florida 33134, this 20th day of May, 1976.

JOHN S. LLOYD, City Attorney
S. R. STERBENZ, Asst City Attorney
65 S. W. 1st Street, Miami, Florida
Attorneys for City of Miami

By _____
S. R. STERBENZ, Of Counsel